Nikodo (S) Pte Ltd v GVC Karaoke Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-12-117-96
ABDUL KADIR SULAIMAN J
14 MARCH 1997

Civil Procedure *— Appeal — Subordinate court appeal — Application to file supplementary record of appeal — Appeal against interlocutory orders to judge in chambers — Whether notes of evidence, grounds of judgment and memorandum of appeal was required for the purpose of appeal pursuant to O 49 r 6 of the Subordinate Courts Rules 1980 — Subordinate Courts Rules 1980 O 49 r 6 — Rules of the High Court 1980 O 55 r 2(1)*

The applicant applied for leave to file a supplementary record of appeal comprising the notes of evidence, the grounds of judgment and the sealed order of the court appealed from, and also the memorandum of appeal, within two weeks of the receipt of the notes of evidence and the grounds of judgment from the court appealed from. The decision appealed against was the decision of the sessions court judge made pursuant to O 26A of the Subordinate Courts Rules 1980 ('the SCR'). The issue before the court was whether the notes of evidence, the grounds of judgment and the memorandum of appeal was required for the purpose of appeal pursuant to O 49 r 6 of the SCR in the light of O 55 r 2(1) of the Rules of the High Court 1980 ('the RHC').

Held, allowing the application to file a supplementary record of appeal containing the sealed order of the court below:

By the operation of O 49 r 6(1) of the SCR, an appeal against interlocutory orders made by magistrates and sessions court judge is to lie to a judge in chambers as distinct from an appeal against the decisions of the subordinate courts made after a trial where the appeal is to lie to a judge in open court. Also under r 6(3), it is provided that the record of appeal 'shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal'. It was obvious, therefore, that by not requiring the notes of evidence, the grounds of judgment and a memorandum of appeal to be included in the record of appeal, this nature of appeal pursuant to O 49 r 6 of the SCR was an exception to the general rule in O 55 r 2(1) of the RHC (see p 746C–E); *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 and *Yupaporn Seangarthit v Neil Allan Campbell Webb* [1995] 3 MLJ 705 not followed; *Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd* [1996] 2 AMR 2618 and *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 3 AMR 4054 followed.

[Bahasa Malaysia summary

Pemohon memohon untuk kebenaran memfailkan satu rekod rayuan tambahan yang terdiri daripada nota-nota keterangan, alasan penghakiman dan perintah bermeterai mahkamah yang dirayu, dan

juga memorandum rayuan, dalam tempoh dua minggu daripada penerimaan nota-nota keterangan dan alasan penghakiman yang dirayu. Keputusan yang dirayu adalah keputusan hakim mahkamah sesyen yang dibuat menurut A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Isu di hadapan mahkamah adalah sama ada nota-nota keterangan, alasan penghakiman dan memorandum rayuan dikehendaki untuk tujuan rayuan menurut A 49 k 6 KMR memandangkan A 55 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, membenarkan permohonan untuk memfailkan rekod rayuan tambahan yang mengandungi perintah bermeterai mahkamah bawah:

Melalui operasi A 49 k 6(1) KMR, suatu rayuan terhadap perintah interlokutori yang dibuat oleh majistret dan hakim mahkamah sesyen terletak pada hakim dalam kamar berbeza daripada rayuan terhadap keputusan mahkamah rendah yang dibuat selepas perbicaraan di mana rayuan terletak kepada hakim di mahkamah terbuka. Juga di bawah k 6(3), ia diperuntukkan bahawa rekod rayuan 'haruslah tidak termasuk nota-nota keterangan, alasan penghakiman atau apa-apa memorandum rayuan'. Oleh yang demikian, adalah jelas bahawa dengan tidak menghendaki nota-nota keterangan, alasan penghakiman dan memorandum rayuan dimasukkan dalam rekod rayuan, jenis rayuan ini menurut A 49 k 6 KMR adalah suatu kekecualian kepada rukun am dalam A 55 k 2(1) KMT (lihat ms 746C–E); *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 dan *Yupaporn Seangarthit v Neil Allan Campbell Webb* [1995] 3 MLJ 705 tidak diikut; *Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd* [1996] 2 AMR 2618 dan *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 3 AMR 4054 diikut.]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd [1996] 2 AMR 2618 (folld)
Siang Galau v Ang Wak Hiong [1994] 1 MLJ 42 (refd)
Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd [1995] 1 CLJ 113 (not folld)
Vong Ban Hin v Laksamana Realty Sdn Bhd [1996] 3 AMR 4054 (folld)
Yupaporn Seangarthit v Neil Allan Campbell Webb [1995] 3 MLJ 705 (not folld)

Legislation referred to

Rules of the High Court 1980 O 55 r 2(1)
Subordinate Courts Rules 1980 O 26A, O 49 rr 6, 6(3)

Gurmeet Kaur Sidhu (*Shearn Delamore & Co*) for the appellant. A

Abdul Kadir Sulaiman J: By a notice of motion the applicant applies, inter alia, for leave to file a supplementary record of appeal comprising the notes of evidence, the grounds of judgment and the sealed order of the court appealed from, and also the memorandum of appeal, within two weeks of the receipt of the notes of evidence and the grounds of judgment from the court appealed from. As to the order of the court below, only a draft copy prepared by the counsel for the appellant was included in the original record of appeal filed on 7 May 1996 because by then the sealed order was not ready for its extraction. It was only made available about a month ago. However, to date the notes of evidence and the grounds of judgment had not been supplied by the lower court and no notice in Form 141 was issued. The decision appealed against was the decision of the learned sessions court judge made pursuant to O 26A of the Subordinate Courts Rules 1980 ('the SCR'). B C

There is still confusion among the practitioners concerning the compilation of the records for purpose of appeal from the decision made by a subordinate court other than a decision made after trial. This confusion arose over the interpretation of O 49 r 6(3) of the SCR and O 55 r 2(1) of the Rules of the High Court 1980 ('the RHC'). Order 49 r 6 was introduced into the SCR by PU (A) 193/93 which came into force on 1 August 1993, whilst O 55 r 2(1) of the RHC was introduced by PU (A) 462/90 which came into force earlier than O 49 r 6 of the SCR which was on 1 January 1991. D E

First, as to the requirement of the filing and serving of the memorandum of appeal in an appeal over the decision other than a decision made after trial made by the subordinate court. Order 49 r 6(3) of the SCR expressly states that the record of appeal shall not include, inter alia, any memorandum of appeal. Richard Malanjum J in *Sykt Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 whilst holding that a memorandum of appeal should not be taken as forming part of the appeal record, was of the view that the memorandum of appeal is required for the purpose of appeal pursuant to O 49 r 6 of the SCR in the light of O 55 r 2(1) of the RHC. The Court of Appeal in *Yupaporn Seangarthit v Neil Allan Campbell Webb* [1995] 3 MLJ 705 endorsed the view of the learned judge in *Sykt Kayu Bersatu Sdn Bhd*, in that O 49 r 6(3) of the SCR cannot be understood to mean that it has abrogated the requirement of O 55 r 2 of the RHC. The dicta in *Yupaporn Seangarthit*, in my view, is obiter because the issue before the Court of Appeal was whether leave to appeal to the Court of Appeal from the decision of the High Court should be allowed. The Court of Appeal dismissed the application of the appellant for leave to appeal to it. At p 709, the court said: F G H I

> The present case shows the confusion that has arisen by the exclusion provided. What appellant's counsel could have done in the High Court was to apply for an extension of time to file the memorandum. Bearing in mind the fact that notice of objection had been given only the day before, the High Court judge may readily have agreed.

In the circumstances, this was not a fit case to give leave to appeal. The proper application here was for extension of time, and that application should have been made in the High Court.

In *Pembinaan Nadzri Sdn Bhd v Koon Hoe & Co Sdn Bhd* [1996] 2 AMR 2618, the appeal to the High Court is made pursuant to O 49 r 6 of the SCR. There was no memorandum of appeal filed by the appellant in respect of the appeal. Before the learned judicial commissioner, the respondent raised a preliminary objection that the appeal was incomplete and defective, having violated the provisions of O 55 r 2 of the RHC. *Yupaporn Seangarthit* was cited as the authority for that. But the appellant contended that O 55 r 2 applied only to appeals brought under rr 2 or 3 of O 49 in connection with a full trial and so the rule has nothing to do with the subject matter of the appeal. The issues that arose before the learned judicial commissioners were:

(1) whether, bearing in mind the judgment in *Yupaporn* and *Sykt Kayu Bersatu*, and the maxim of stare decisis, the appellant was bound to comply with the requirement of O 55 r 2 RHC;

(2) whether O 55 r 2 RHC applied only to appeals brought under rr 2 and 3 of O 49 SCR in matters arising from full trial, and so, was irrelevant to the interlocutory application herein; and

(3) whether O 49 r 6 SCR was a special procedure that catered specifically to appeals from decisions of interlocutory applications, and as such, would operate independently of O 55 r 2 RHC.

The learned judicial commissioner having considered the matter concluded that the learned judge in *Sykt Kayu Bersatu* had not adequately dealt with the provisions of O 49 r 6 of the SCR and O 55 of the RHC. However, if he had, his conclusions thereof were flawed in that they were not in conformity with the legislative intention. The learned judicial commissioner traced the history of O 49 of the RHC and gave a lengthy explanation in support of his argument that in an appeal against the decision by the subordinate courts other than a decision made after trial, no memorandum of appeal is required. He concluded that since his disagreement is with the learned judge's analysis of the substantive issue which was fully endorsed by the Court of Appeal in *Yupaporn*, the question of whether or not he is bound by the principle of stare decisis also does not arise. I fully support the view of the learned judicial commissioner for the reason which I will give later in this judgment.

After the decision in *Pembinaan Nadzri Sdn Bhd*, there came another decision of the High Court by Augustine Paul JC in *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 3 AMR 4054. The appellant filed an appeal to the High Court against the decision of the session court judge under O 49 r 6 of the SCR. On 4 September 1996, the appellant, being of the opinion that he was compelled to do so as a result of certain observations made by the Court of Appeal in *Yupaporn* filed an application for extension of time to file the relevant memorandum of appeal. The issue before the court is whether a memorandum of appeal is required to be filed in such an appeal. Following the decision in *Pembinaan Nadzri Sdn Bhd*, the learned judicial commissioner held in the negative. At p 4058, the learned judicial commissioner said:

> This Order (O 49 r 6 of the SCR) was introduced by PU (A) 193/93 with the object of allowing litigants to appeal against interlocutory orders made by magistrates and sessions court judges. Prior to this, an appeal may lie only against a final decision. In view of the large number of appeals that may arise under the new provision thereby resulting in increased workload for the subordinate court officers, the Rules Committee, in its wisdom, found it unnecessary for the notes of evidence, grounds of judgment and the memorandum of appeal to be filed in such appeals.

To this statement I wholly subscribed. By the operation of O 49 r 6(1) of the SCR, this nature of appeal is to lie to a judge in chambers as distinct from an appeal against the decisions of the subordinate courts made after a trial where the appeal is to lie to a judge in open court. Also under r 6(3), it is provided that the record of appeal 'shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal'. As we know, in an appeal proper, three matters need to be filed by an appellant to move the hearing of the appeal. The first is the notice of appeal. The second is the record of appeal and the third is the memorandum of appeal. The memorandum of appeal does not form part of the record of appeal: *Siang Galau v Ang Wak Hiong* [1994] 1 MLJ 42. It is pretty obvious, therefore, that by not requiring the notes of evidence, the grounds of judgment and a memorandum of appeal to be included in the record of appeal, this nature of appeal pursuant to O 49 r 6 of the SCR is an exception to the general rule. The decision of Richard Malanjum J in *Sykt Kayu Bersatu* cannot, therefore, be supported on this ground because O 55 r 2(1) of the RHC omits to mention O 49 r 6(3). The memorandum of appeal contains grounds of appeal based on the grounds of judgment or decision by the presiding judge of the court appealed from. Without the grounds of judgment, the appellant would not be able to know the reason for the decision appealed against and in the circumstances would not be able to frame his memorandum of appeal. Therefore, O 55 r 2(1) of the RHC is in consonant with the exclusion provided in O 49 r 6(3) of the SCR. By the exclusion, it would mean that in an appeal against the decision of the subordinate court other than a decision made after trial, there will not be before the judge in chambers the notes of evidence, the grounds of judgment or any memorandum of appeal. This procedure, in respect of an appeal pursuant to O 49 r 6 of the SCR, brought about by PU (A) 193/93 is akin to the procedure in respect of an appeal from the decision of a registrar to a judge in chambers in interlocutory matters under O 56 of the RHC where according to *Mallal's Supreme Court Practice* (2nd Ed) at p 680:

> The appeal is by way of rehearing and the judge treats the matter as if it has come up for hearing for the first time. The judge will of course give the decision of the Registrar its due weight but he is not bound by it. Nor is he bound by the direction exercised by the registrar. See *Evans v Bartlam* [1937] AC 473.

On the registrar's notes, the learned author at p 682 says:

A The court will only recognize a note of the registrar as evidence of what took place before him, an affidavit being inadmissible: *Sykes v Sykes* [1897] P 306. See also *R v Pestanji* (1873) 10 Bom HCR 75 at p 81 and *Hur Dyal v Heeralal* (1871) 16 WR 107. Grounds of decision cannot be required by the appellant and are usually given in exceptional cases only.

B For that reason as a matter of practice, the registrar is not obliged to provide his grounds of judgment in such a matter of appeal to the judge. In the circumstances, it is my view that in an appeal from the decision made by the subordinate court other than a decision made after trial, no notice in Form 141 is required as distinct from an appeal from a decision made after trial. Further, the opening words of O 49 r 6(1) by the use of C the phrase 'Notwithstanding anything contained in this Order ...' have taken away the operation of O 49 r 2(4) or r 3(2) in an appeal under r 6 thereof. In the circumstances, the view expressed by the learned judge in *Sykt Kayu Bersatu* connecting the procedure of appeal pursuant to O 49 r 6 of the SCR with O 55 r 2 of the RHC cannot be supported.

D As to the issue of stare decisis in the light of the dicta in the Court of Appeal in *Yupaporn*, in my view, it does not arise at all. In the High Court, the appellate stage, the appellant did not file his memorandum of appeal even though he was served with a notice in Form 141 by the lower court. The respondent took objection for the failure of the appellant to serve on him the memorandum of appeal pursuant to O 55 of the RHC and the E learned judge agreed with the respondent and dismissed the appellant's appeal. In order to mount an appeal against this decision of the High Court, the appellant went to the Court of Appeal for leave. Before the Court of Appeal, the learned counsel in support of the leave application made the same submission he made in the High Court to the effect that F O 49 r 6(3) of the SCR dispenses with the need for a memorandum of appeal. The Court of Appeal did not find favour with that line of reasoning. It is in this context that the Court of Appeal referred to the decision in *Sykt Kayu Bersatu*, and endorsed it. In the circumstances, the Court of Appeal said that it was not a fit case for it to give leave to appeal. The Court of Appeal was of the view that the proper application for the appellant to G make was one before the High Court for extension of time to file the memorandum of appeal. Therefore, at that point of time, the Court of Appeal was not sitting to hear the substantive appeal of the appellant for that occasion has not arrived until leave to appeal is given by it. So the views expressed by the Court of Appeal relating to the need to file the H memorandum of appeal, the notes of evidence and the grounds of judgment in an appeal pursuant to O 49 r 6 of the SCR made at the stage of an application for leave to appeal against the decision of the High Court, is obiter and cannot be the ratio decidendi in the case which would bind all courts inferior to it. I would take this opportunity to endorse wholeheartedly what was said by the learned judicial commissioner in *Vong Ban Hin*, I beginning from line 15 on p 4063 to line 9 at p 4064 on the issue of stare decisis. Being obiter dicta, *Yupaporn* cannot be said to be a binding authority to the effect that, in an appeal pursuant to O 49 r 6 of the SCR,

the notes of evidence, the grounds of judgment and the memorandum of appeal must be filed and served.

In the light of the above reasoning, I allow the application of the applicant in this case to file supplementary record of appeal containing the sealed order of the court below, within two weeks. It is not necessary for the applicant to file the notes of evidence, the grounds of judgment of the learned sessions court judge, and the memorandum of appeal in respect of this appeal as they are not required for the purpose of the appeal. I order that the hearing of the appeal be proceeded with soon after the period of the two weeks, on a date to be fixed by the registrar.

Application allowed.

Reported by Loo Lai Mee